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No. 07-543

IN THE
Supreme Court of United States

AT&T CORPORATION,
Petitioner,
v.

NOREEN HULTEEN ; ELEANORA COLLET ;
LINDA PORTER ; ELIZABETH SNYDER ;
COMMUNICATION WORKERS OF AMERICA,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF ON BEHALF OF CAITLIN BORGMANN, DEBORAH BRAKE, MARTHA DAVIS, JOANNA GROSSMAN, SYLVIA LAW, WENDY PARMET, SUSAN DELLER ROSS, MICHELLE TRAVIS, JOAN WILLIAMS, WENDY WILLIAMS, DEBORAH WIDISS AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

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BRIEF ON BEHALF OF CAITLIN BORGMANN, DEBORAH BRAKE, MARTHA DAVIS, JOANNA GROSSMAN, SYLVIA LAW, WENDY PARMET, SUSAN DELLER ROSS, MICHELLE TRAVIS, DEBORAH WIDISS, JOAN WILLIAMS, AND WENDY WILLIAMS AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

This group of legal scholars respectfully submits this brief as *amici curiae* in support of Respondents. Letters of consent have been filed with the Clerk.[1]

INTEREST OF AMICUS CURIAE

Amici curiae, academics representing the fields of law and history, submit this brief in support of respondents. *Amici curiae* are a group of law professors and legal scholars who teach, write, and practice in the area of employment discrimination and gender equality and who share a strong professional interest in issues relating to the effect and scope of Title VII as it relates to sex discrimination and disfavored treatment of pregnancy in the workplace. *Amici* seek to provide this Court with their professional academic perspective on these issues, as they arise in this litigation.

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[1] No counsel for a party authored this brief in whole or in part, and no such counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amici curiae*, or their counsel, made a monetary contribution intended to fund its preparation or submission. The parties have consented to the filing of this brief and such consents have been lodged with the clerk.

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SUMMARY OF ARGUMENT

Years after the effective date of the Pregnancy Discrimination Act ("PDA"), AT&T set Respondents' pension benefits below what they would have been but for the fact that Respondents had taken medical leave associated with pregnancy and childbirth, as opposed to any other medical condition. Petitioner argues that, under *United Air Lines, Inc. v. Evans*, 431 U.S. 553 (1977), the only relevant unlawful employment practice occurred when, upon their return from pregnancy disability leave, AT&T recorded Respondents' leave, as a matter of internal administration, in a manner that would later be used for a discriminatory pension-setting decision. That is so, AT&T contends, irrespective of whether the recording of leave had *any* contemporaneous effect upon the terms of Respondents' employment. Therefore, according to AT&T, the relevant discriminatory act occurred outside Title VII's limitation period. But under *Ledbetter v. Goodyear Tire & Rubber Co.*, 127 S. Ct. 2162, 2169 (2007), AT&T's pension-setting decision violated Title VII anew—regardless of whether the prior act of recording Respondent's service credit upon their return to work was a complete, actionable discriminatory act.

AT&T further argues that the decision below gave impermissible retroactive effect to the PDA. That argument is meritless. The pension-setting decisions at issue occurred years after the effective date of the PDA, and enforcing Title VII's guarantee of equality *today*, as confirmed by the PDA, does not give

retroactive effect to the statute simply because the relevant pregnancy leave was taken before the PDA was enacted. Additionally, by the early 1970s, AT&T knew (or should have known) that any pension benefits decision relying on a calculation of days worked that discriminated on the basis of pregnancy would be unlawful. Prior to 1976, it was the uniform view of the federal courts of appeals and the EEOC that such discrimination constituted sex discrimination within the meaning of Title VII. The PDA merely confirmed that that view was correct.

Congress also recognized the reality that an employer's policies concerning pregnancy-related issues can be (and have been) used to hinder women's opportunities in the workplace. The PDA clarified that such policies are contrary to Congress's goal of substantive equality in the workplace. Accordingly, taking its cue from Congress, this Court has eschewed its former formalistic interpretations of Title VII in favor of a more functional approach that is faithful to Congressional intent. Under that approach, AT&T's policy violates Title VII—and would have, had the PDA never been enacted.

ARGUMENT

I. UNDER *LEDBETTER*, THE RELEVANT DISCRIMINATORY ACT WAS THE SETTING OF RESPONDENTS' PENSION BENEFITS

Title VII of the Civil Rights Act of 1964, as amended by the PDA, requires that "women affected by pregnancy, childbirth, or related medical conditions shall be treated the same for all employment-related purposes, including receipt of

benefits under fringe benefit programs, as other persons not so affected but similar in their ability or inability to work." Pub. L. No. 95-555, 92 Stat. 2076 (codified as amended at 42 U.S.C. § 2000e(k)). Neither AT&T nor the United States would contest that a post-PDA discriminatory pension-setting decision violates the Act if the employer reviews the worker's file and calculates her term of employment "de novo", giving credit to all kinds of medical leave except pregnancy disability leave. But, AT&T argues, the law applies in a dramatically different way to an employer who happens to keep a running tab on a worker's term of employment service, recording service credits upon the worker's return from leave. In that circumstance, AT&T argues, the unlawful employment practice occurs at the time the service credit is recorded in the employee's file, and future reliance on that data in setting the worker's pension benefits, years later, does not itself violate Title VII. That interpretation is inconsistent with this Court's decision in *Ledbetter*, the text and purpose of the statute, and common sense.

In *Ledbetter*, this Court held that Title VII's prohibition of discrimination "against any individual with respect to his compensation . . . because of such individual's . . . sex," 42 U.S.C. § 2000e-2(a)(1), creates a new cause of action "after each allegedly discriminatory pay decision [is] made." 127 S. Ct. at 2169. That is so, this Court reasoned, because that is the moment at which "discriminatory intent" and "an employment practice" come together. *Id.* at 2171. Here, AT&T's discriminatory intent did not coincide with an actionable employment practice until AT&T used Respondents' improperly-adjusted Net Credited

Service ("NCS") dates to determine their pension benefits upon their retirement.

The Ninth Circuit's interpretation is not only compelled by this Court's decision in *Ledbetter*, but also makes sense. Under AT&T's view, if it had calculated Respondents' years and days of employment for purposes of setting their pension benefits *for the first time* at retirement, rather than relying on a service account of the time worked that had been adjusted on a running-tab basis, Respondents' claims would be, unquestionably, timely. There is nothing in the text or history of the PDA to support an interpretation under which the limitation period of two substantively identical Title VII claims turns purely on serendipity.

II. THE DECISION BELOW DID NOT GIVE THE PDA IMPERMISSIBLE RETROACTIVE EFFECT

A. Construing Title VII To Proscribe Reliance on Past Discriminatory Recording of Service Credit in Setting Post-PDA Pension Benefits Does Not Give the PDA Retroactive Effect.

AT&T advanced Respondents' NCS dates when they returned from leave, according to its policy of denying full credit for pregnancy leaves but granting it for medical leaves taken for other reasons. AT&T argues that because this "adjustment" to Respondents' NCS dates happened before the PDA was enacted, in anticipation of future discriminatory treatment in the setting of their pension benefits, applying the PDA to Respondents would give the PDA retroactive effect. That argument is meritless. A law that applies only

prospectively may nevertheless require a change in the treatment of past events for purposes of present-day (post-enactment) decisions. It was not until Respondents retired, years after the PDA was enacted, that AT&T set their pension benefits, failing to credit them for tenure accrued during pregnancy-related medical leave.

This Court's decision in *Bazemore v. Friday*, 478 U.S. 385 (1985) (*per curiam*), illustrates the point. There, this Court held that an employer could not simply continue to rely on its pre-enactment salary structure to set future wages. *Id.* at 396-97. This Court so held, notwithstanding that "the day *before* the [Act] took effect, it was lawful to rely on" the employer's prior discriminatory decisions in setting wages. (Petr. Br. 18). Yet, nowhere in *Bazemore* did this Court suggest that its holding gave Title VII a retroactive effect. And precluding AT&T from blindly relying on its previous adjustment of Respondents' term of employment service certainly does not subject it to liability for "a past act that [it] is helpless to undo." *Fernandez-Vargaz v. Gonzales*, 548 U.S. 30, 44 (2006).

B. In Any Event, As This Court Has Recognized, the PDA Merely Reestablished the Meaning of Sex Discrimination in Title VII, Confirming the Uniform View Among Federal Courts of Appeals That Unfavorable Treatment of Pregnancy Is Sex Discrimination.

Even assuming that, as a general matter, applying a law in a manner that requires an employer to reconsider its treatment of past events for purposes of post-enactment decisions somehow renders that law "retroactive," Petitioner's argument still fails, because, as this Court has recognized, Title VII *always* prohibited the type of unfavorable treatment of pregnancy leave that is at issue in this case. It should have been clear to AT&T at all times that, based on a nearly universal understanding of Title VII, any determination of pension benefits based on an NCS system under which pregnancy leave is treated unfavorably constitutes unlawful sex discrimination. Adopting AT&T's arguments in this case would therefore reward them for ignoring controlling legal authorities and for resisting compliance with Title VII. *See Bazemore*, 478 U.S. at 395.

1. Prior to 1976, the Courts Uniformly Held That an Employer's Failure To Credit Time Taken for Pregnancy Leave to the Same Extent As Other Temporary Disability Leave Constituted Sex Discrimination under Title VII.

Prior to 1976, the courts uniformly understood that crediting pregnancy leave less favorably than other types of medical leave constituted sex discrimination under Title VII. *See Satty v. Nashville Gas Co.*, 522 F.2d 850 (6th Cir. 1975) (holding that differential treatment of pregnancy leave for purposes of calculating days worked, which affected employees' calculation of seniority, constituted sex discrimination under Title VII); *aff'd in relevant part, vacated in part*, 434 U.S. 136 (1977); *Commc'n Workers of Am. v. Am. Tel. & Tel. Co.*, 513 F.2d 1024 (2d Cir. 1975) (finding that district court erred in dismissing complaint, for failure to state a cause of action, that alleged that denying accrual of seniority and other benefits while on temporary disability due to pregnancy and childbirth violated Title VII), *judgment vacated and case remanded for further consideration in light of Gen. Elec. Co. v. Gilbert,* 429 U.S. 125 (1976), 429 U.S. 1033 (1977); *Zichy v. City of Philadelphia*, 392 F. Supp. 338 (E.D. Pa. 1975) (holding that less favorable treatment of pregnancy and maternity-related disability leave vis-à-vis other medical leave, for purposes of, *inter alia*, credit for time worked for

future pension benefits constituted sex discrimination under Title VII), *rev'd and remanded*, 559 F.2d 1210 (3d Cir. 1977), *reversal limited*, 590 F.2d 503 (3d Cir. 1979) (remanding to district court to reconsider Title VII claims in light of *Nashville Gas Co. v. Satty*, 434 U.S. 136 (1977) and other cases, and dismissing argument that that order was prohibited by "law of the case" doctrine); *Satty v. Nashville Gas Co.*, 384 F. Supp. 765 (M.D. Tenn. 1974) (holding that the denial of previously accumulated seniority for the purpose of bidding on job openings for employees returning from pregnancy leave constituted sex discrimination under Title VII), *aff'd in relevant part, vacated in part*, 434 U.S. 136 (1977); *Healen v. Eastern Airlines, Inc.*, No. 18097, 1973 WL 359 (N.D. Ga. Dec. 27, 1973) (denying motion to dismiss claim alleging Title VII violation for failure to credit time on maternity leave for seniority status, accrual of vacation and sick leave time). These decisions were consistent with the general understanding at the time, reflected in dozens of federal court decisions including all courts of appeals to address the matter, that all types of disfavored

treatment of pregnancy violated Title VII's prohibition against sex discrimination.[2]

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[2] *See, e.g.*, *Berg v. Richmond Unified Sch. Dist.*, 528 F.2d 1208 (9th Cir. 1975); *Hutchison v. Lake Oswego Sch. Dist. No. 7*, 519 F.2d 961 (9th Cir. 1975); *Gilbert v. Gen. Elec. Co.*, 519 F.2d 661 (4th Cir. 1975), *vacated*, 429 U.S. 125 (1976); *Holthaus v. Compton & Sons, Inc.*, 514 F.2d 651 (8th Cir. 1975); *Wetzel v. Liberty Mut. Ins. Co.*, 511 F.2d 199, 206 (3d Cir. 1975), *vacated on jurisdictional grounds*, 424 U.S. 737 (1976); *Buckley v. Coyle Pub. Sch. Sys.*, 476 F.2d 92, 95 (10th Cir. 1973); *In re Nat'l Airlines, Inc.*, 434 F. Supp. 249 (S.D. Fla. 1977); *Purvine v. Boyd Coffee Co.*, No. 75-324, 1976 WL 674 (D. Or. Oct. 26, 1976); *EEOC v. Children's Hosp. of Pittsburgh*, 415 F. Supp. 1345 (W.D. Pa. 1976); *Farris v. Bd. of Educ. of St. Louis*, 417 F. Supp. 202 (E.D. Mo. 1976); *Mitchell v. Bd. of Trustees of Pickens County Sch. Dist. "A,"* 415 F. Supp. 512 (D.S.C. 1976); *Fabian v. Indep. Sch. Dist. No. 89 of Okla. County, Okla.*, 409 F. Supp. 94 (W.D. Okl. 1976); *St. John v. G. W. Murphy Indus., Inc.*, 407 F. Supp. 695 (W.D.N.C. 1976); *EEOC v. Barnes Hosp.*, No. 75-545C(3), 1975 WL 305 (E.D. Mo. Dec. 22, 1975); *Stansell v. Sherwin-Williams Co.*, 404 F. Supp. 696 (N.D. Ga. 1975); *Oakland Fed'n of Teachers v. Oakland Unified Sch. Dist.*, No. C741768WTS, 1975 WL 210 (N.D. Cal. July 16, 1975); *Liss v. Sch. Dist. of City of Ladue*, 396 F. Supp. 1035 (E.D. Mo. 1975); *Sale v. Waverly-Shell Rock Bd. of Educ.*, 390 F. Supp.784 (N.D. Iowa 1975); *Vineyard v. Hollister Elementary Sch. Dist.*, 64 F.R.D. 580 (N.D. Cal. 1974); *Singer v. Mahoning County Bd. of Mental Retardation*, 379 F. Supp. 986 (N.D. Ohio 1974), *aff'd on other grounds*, 519 F.2d 748 (6th Cir. 1975); *Gilbert v. Gen. Elec. Co.*, 375 F. Supp. 367 (E.D. Va. 1974), *aff'd*, 519 F.2d 661 (4th Cir. 1975), *vacated*, 429 U.S. 125 (1976); *Farkas v. South Western City Sch. Dist.*, No. C27369-1, 1974 WL 225 (S.D. Ohio Apr. 8, 1974); *Wetzel v. Liberty Mut. Ins. Co.*, 372 F. Supp. 1146 (W.D. Pa. 1974), *aff'd*, 511 F.2d 199 (3d Cir. 1975); *Newmon v. Delta Airlines, Inc.*, 374 F. Supp. 238 (N.D. Ga. 1973); *Lillo v. Plymouth Local Bd. of Educ.*, No. C 73-184-Y, 1973 WL 343 (N.D. Ohio Oct. 3, 1973); *Schattman v. Tex. Employment Comm'n et al.*, 330 F. Supp. 328 (W.D. Tex. 1971). *But see Rafford v. Randle E. Ambulance Serv., Inc.*, 348 F. Supp. 316 (S.D. Fla. 1972).

These decisions were also in line with the authoritative guidelines issued by the EEOC in 1972, which were entitled to "great deference" by courts in interpreting the contours of Title VII. *See Udall v. Tallman*, 380 U.S. 1, 16 (1965) ("When faced with a problem of statutory construction, this Court shows great deference to the interpretation given the statute by the officers or agency charged with its administration."); *Griggs v. Duke Power Co.*, 401 U.S. 424, 434 (1971); *Phillips v. Martin Marietta Corp.*, 400 U.S. 542, 545 (1971) (Marshall, J., concurring).

The EEOC's 1972 guidelines made clear that, for purposes of crediting days worked, any policy that failed to provide at least equal treatment for pregnancy-related leave as compared to other disability leave would constitute sex discrimination under Title VII. It stated in pertinent part:

> Written or unwritten employment policies and practices involving matters such as . . . the accrual of seniority and other benefits and privileges . . . shall be applied to disability due to pregnancy, childbirth or related medical conditions on the same terms and conditions as they are applied to other disabilities.

29 C.F.R. 1604.10(b) (1975).

By the early 1970s, therefore, employers were on notice that policies that did not count pregnancy leave the same way as other medical or disability leaves violated Title VII's prohibition on sex discrimination. Indeed, the primary purpose of EEOC guidelines was

to put employers and employees on notice as to whether they could expect the EEOC to seek enforcement in court. *See Intlekofer v. Turnage*, 973 F.2d 773, 778 (9th Cir. 1992) (holding that employer should have known to put an end to sexual harassment practices because it had long been on notice that, under the EEOC Compliance Guidelines and case law of neighboring circuit courts, Title VII required it to do so); *see also LeBeau v. Libbey-Owens-Ford Co.*, 799 F.2d 1152, 1162 (7th Cir. 1986) ("[T]he [EEOC] guidelines put defendants on notice that such conduct would not be considered lawful."); *City of Los Angeles, Dept. of Water & Power v. Manhart*, 435 U.S. 702, 730 (1978) (Marshall, J., concurring in part and dissenting in part) ("[C]onscientious and intelligent [pension plan] administrators . . . should have responded to the EEOC's guidelines.").[3]

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[3] The United States argues that Petitioner's pre-PDA policies could not have been unlawful under Title VII at the time based on *Gilbert* and a statement in the 1991 EEOC Compliance Manual. (Amicus Br. of U.S. at 12 n.2.) As discussed below, *see infra* at Section II.B.2, *Gilbert*'s narrow holding did not implicate the legality of the use of AT&T's NCS system for setting pension benefits. Moreover, the EEOC statement which the United States cites is a retrospective statement inconsistent with the EEOC's interpretation of Title VII that was operable during the relevant time period, and is likely based on its interpretation of subsequent case law. While courts should pay deference to EEOC interpretations of statutes and regulations under its purview, "[a]gencies have no special claim to deference in their interpretation of [the Supreme Court's] decisions." *Ledbetter*, 127 S. Ct. at 2177 n.11 (citing *Reno v. Bossier Parish Sch. Bd.*, 528 U.S. 320, 336 n.5 (2000)). Regardless, to the extent that the current EEOC Compliance Manual provides guidance on this issue, it requires employers, when setting pension benefits, to treat calculations of days worked during pregnancy leave the same as all other medical leaves. EEOC Compliance Manual, ch. 3, Employee Benefits, Title VII/EPA Issues III.B (Oct. 3, 2000).

2. *Gilbert* Was Limited to Policies Relating to Pay and Benefits *During* Pregnancy and Pregnancy Leave.

In *General Electric Co. v. Gilbert*, this Court held that the failure of an employer to provide disability benefits during pregnancy leave, while providing such benefits during other temporary leave, did not constitute sex discrimination under Title VII. 429 U.S. 125, 140-41 (1976). As discussed *infra*, Congress acted swiftly to reestablish the original purpose and understanding of Title VII by enacting the PDA a little more than a year later. Even before Congress acted, however, this Court made clear that *Gilbert* should be construed narrowly and applied only to policies relating to pay and benefits *during* pregnancy and pregnancy leave. *See Nashville Gas Co. v. Satty*, 434 U.S. 136, 141-43 (1977) (holding that differential treatment of pregnancy leave for purposes of calculating days worked, which affected employees' calculation of seniority, could not be analyzed in the same way as the health benefits in *Gilbert* because of the punitive and long-ranging impact of the policy on female employees).

In determining that General Electric's failure to extend health coverage to employees during pregnancy leave did not violate Title VII, the *Gilbert* majority refused to acknowledge that a policy that failed to cover disability benefits during the kind of leave that only women need to take violated Title VII. Rather than recognizing that disfavored treatment of pregnancy discriminates against women, the Court adopted the formalistic approach of *Geduldig v. Aiello*, 417 U.S. 484, 494 (1974), in which the Court held that a state-operated disability income protection program

that excluded normal pregnancy did not violate the Equal Protection Clause of the Fourteenth Amendment because all male and female non-pregnant employees were treated alike. Similarly, in *Gilbert*, the Court framed the classification contained in General Electric's disability health benefits policy as between pregnant and non-pregnant persons rather than between men and women. 429 U.S. at 135. According to the Court, since only pregnant women would be adversely affected by the exclusion of pregnancy-related health benefits, and non-pregnant women would not, the classification was not sex-based. Second, the Court concluded that because pregnancy was "an *additional* risk, unique to women," and the policy did not destroy the "presumed parity of the benefits" between men and women, sex discrimination was not present. *Id.* at 139 (emphasis added).

The majority opinion prompted Justices Stevens and Brennan to issue two stinging dissents. Justice Stevens concluded that the plain language of Title VII prohibited General Electric's plan because it placed the risk of absence caused by pregnancy in a class by itself, and "by definition, such a rule discriminates on account of sex; for it is the capacity to become pregnant which primarily differentiates the female from the male." *Id.* at 161-62 (Stevens, J. dissenting). Justice Brennan sharply criticized the majority for failing to appreciate that General Electric's policies reflected stereotypes concerning the place that employment occupied in women's lives and the "broad social objectives" promoted by Title VII. *Id.* at 148-50 & n.1 (Brennan, J., dissenting). Justice Brennan found the EEOC's understanding that excluding

pregnancy from a disability insurance plan was "incompatible with the overall objectives of Title VII" to "represent a particularly conscientious and reasonable product of EEOC deliberations," thereby meriting great deference. *Id.* at 148, 157 (Brennan, J., dissenting). He stated that the majority's rejection of the EEOC guidelines was unjustified. *Id.* at 148 (Brennan, J., dissenting).

Shortly after its decision in *Gilbert*, this Court decided *Nashville Gas Co. v. Satty*, 434 U.S. 136 (1977). The Court drew a distinction between employer policies that refuse to "extend to women a benefit that men cannot and do not receive," and those policies that impose "a substantive burden that men need not suffer." 434 U.S. at 142. It concluded that a policy that denied accumulated seniority to female employees returning to work following pregnancy leave imposed a substantial burden on women. *Id.* In holding that the policy violated Title VII, the Court emphasized that women, and only women, would suffer the effects of such a policy for the remainder of their careers. *Id.* at 141-42. The Court concluded that Title VII does not "permit an employer to burden

female employees in such a way as to deprive them of employment opportunities because of their different role [in the scheme of human existence]." *Id.* at 142 & n. 4.[4]

Consistent with *Satty*, after the Court's decision in *Gilbert* and before the PDA was enacted, federal courts of appeals continued to hold that a plaintiff could successfully challenge a policy that discriminated on the basis of pregnancy and found policies similar to AT&T's unlawful under Title VII. For example, the Third Circuit held that an employer's practice of denying female employees credited service and seniority for periods during which they were absent from work because of disabilities arising from pregnancy or childbirth constituted unlawful discrimination under Title VII because, *inter alia*, "[t]he Supreme Court in *Nashville Gas Co. v. Satty*, 434 U.S. 136 (1977), made it clear that *Gilbert* ought not to be read broadly as a bar to Title VII claims in situations and on subjects other than those arising in *Gilbert*." *Eberts v. Westinghouse Elec. Corp.*, 581 F.2d 357, 360-61 (3d Cir. 1978); *see also deLaurier v. San Diego Unified Sch. Dist.*, 588 F.2d 674 (9th Cir. 1978); *Love v. Waukesha Joint Sch. Dist.*,

[4] The Court upheld a company policy that failed to extend sick-leave pay to employees disabled by pregnancy, finding it "legally indistinguishable" from the disability-insurance program upheld in *Gilbert*. 434 U.S. at 143.

560 F.2d 285, 288 (7th Cir. 1977); *Liss v. School Dist. of City of Ladue*, 548 F.2d 751, 752 (8th Cir. 1977). [5]

Although *Gilbert* changed the understanding of sex discrimination under Title VII in limited circumstances and for a brief period of time, it did not change the state of the law with respect to policies

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[5] Petitioner cites three cases to support the proposition that before the PDA took effect, its policy was lawful under Title VII. (Petr. Br. 17.) The first case, *Pallas v. Pacific Bell*, mentioned the law prior to *Gilbert* solely in dicta, disposing of it in one sentence. 940 F.2d 1324, 1327 (9th Cir. 1991). In *Ameritech Benefits Plan Committee v. Communication Workers of America,* the issue also was not central to the court's holding, and the court appeared to simply accept the employer's broad characterization of *Gilbert*, similar to Petitioner's erroneous characterization here, without even acknowledging *Satty*. 220 F.3d 814, 823 (7th Cir. 2000). The third case, *In re Southwestern Bell Tel. Co. Maternity Benefits Litigation*, upheld Southwestern Bell's policy, similar to AT&T's policy at issue here, which failed to credit days worked during pregnancy leave like all other types of disability leave. The court held that while the policy at issue in *Satty*, which divested employees of accumulated seniority, constituted a burden "depriv[ing] [women] of employment opportunities because of their different role," the same could not be said for Southwestern Bell's policy. 602 F.2d 845, 848-49 (8th Cir. 1979). That holding, however, failed to meaningfully appreciate the benefit/burden dichotomy established by *Gilbert* and *Satty*. Southwestern Bell's policy clearly imposed a substantial burden under *Satty* because it had the potential to punish only those employees who took pregnancy leave for decades to come since various employee benefits were based on such seniority. *See Eberts*, 581 F.2d at 361 (noting that claims concerning employer's denial of "credited service" for absenteeism from pregnancy or childbirth disability fall within the "substantial burden" category under *Satty*). To frame such a policy as merely the withholding of a benefit, rather than the imposition of a burden, as Petitioner attempts to do, is to mischaracterize it to the point of trivializing the inequity it perpetuates. (Petr. Br. 22.)

like AT&T's. This Court's decision in *Satty* and the decisions of the appellate courts following it made clear that *Gilbert*'s narrow holding was limited to policies relating to pay and benefits during pregnancy and pregnancy leave.[6] Plans that treated pregnancy leave unfavorably for calculation of days worked continued to violate Title VII.[7]

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[6] In *Rivers v. Roadway Express, Inc.*, 511 U.S. 298, 312-13 (1994), this Court made clear that "[a] judicial construction of a statute is an authoritative statement of what the statute meant before as well as after the decision of the case giving rise to that construction." Although *Gilbert*'s holding may serve as an authoritative statement of what Title VII meant as it was applied to the type of benefit policy at issue in that case, the Court's holding in *Satty* makes clear that *Gilbert* did not serve as the authoritative statement on policies of the type at issue here.

[7] This is consistent with the approach taken by the European Union ("EU"). Under EU law, disfavored treatment of a woman related to the calculation of days worked during pregnancy or maternity leave constitutes direct discrimination. *See* Directive of the European Parliament and of the Council on the Implementation of the Principle of Equal Opportunities and Equal Treatment of Men and Women in Matters of Employment and Occupation Council Directive 2006/54/EC, 2006 O.J. (L 204/23) (EU) (on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation (recast)), art. 2(2)(c); ¶ 23; Case C-177/88 *Dekker v. Stichting* [1990] ECR, I-3941, para. 12; Case C-32/93 *Webb v. EMO Air Cargo* [1994] ECR, I-3567, para. 19. *See* Case C-411/96 *Boyle v. Equal Opportunities Comm'n* [1998] ECR, I-6401 (employment contracts cannot limit the ability of women to accrue pension rights during the period of maternity leave); Case C-342/93 *Gillespie v. No. Health & Soc. Servs. Bds.* [1996] ECR, I-475 ("reference pay" used to calculate maternity benefits must take into account any pay raise accrued between the date used to calculate reference pay and the end of maternity leave).

3. As This Court Has Recognized, Congress Enacted the PDA To Make Clear That the Uniform Understanding of the Six Federal Courts of Appeals to Have Addressed Pregnancy Discrimination Before *Gilbert* Was Correct.

To the extent that the *Gilbert* majority's erroneous interpretation of the meaning of sex discrimination under Title VII created uncertainty about whether all, or some, policies that disfavored pregnancy constituted sex-discrimination, the decision was not permitted to stand for very long. As this Court has recognized, Congress swiftly passed the PDA to repudiate the *Gilbert* majority and to make clear that any disfavored treatment of pregnancy for any aspect of employment constitutes sex discrimination under Title VII on its face, as it was previously understood before *Gilbert*.

The PDA not only overturned *Gilbert*, but also rejected the interpretive rationale applied by the Court and affirmed the dissents' interpretation of the statute. *See, e.g., Cal. Fed. Sav. & Loan Ass'n v. Guerra,* 479 U.S. 272, 277 n. 6 (1987); S. Rep. 95-331, at 2 (1977) (Conf. Rep.); H.R. Rep. 95-948, at 2 (1978) (Conf. Rep.) ("It is the Committee's view that the dissenting justices [in *Gilbert*] correctly interpreted the Act."). Congress intended to reestablish Title VII as the robust guarantee of *substantive* equality that it was always intended to be by rejecting the major premise of *Gilbert*: that pregnancy classifications

were gender neutral, rather than sex-based. *See* Reva B. Siegel, *Employment Equality Under the Pregnancy Discrimination Act of 1978*, 94 YALE L.J. 929, 936 (1985). As the House Report describes, the PDA "[made] clear that distinctions based on pregnancy are *per se* violations of Title VII [and] the bill would eliminate the need in most instances to rely on the impact approach, and thus would obviate the difficulties in applying the distinctions created in *Satty*." H.R. Rep. No. 95-948, at 3. Congress therefore made clear what federal appellate courts had already uniformly recognized—that discrimination against pregnancy *is* discrimination against women.

That Congress sought to reinstate the original intent and understanding of Title VII through the PDA is abundantly clear from its legislative history. *See* H.R. Rep. 95-948, at 3, 8 (stating that the PDA was "reestablishing the law as it was understood prior to *Gilbert*" and that the PDA "will reflect *no new legislative mandate* of the Congress nor effect changes in practices, costs, or benefits beyond those intended by Title VII") (emphasis added). Senator Javits, who co-sponsored the bill, explained:

> This legislation does not represent a new initiative in employment discrimination law, neither does it attempt to expand the reach of title VII of the Civil Rights Act of 1964 into new areas of employment relationships. Rather, this bill is simply corrective legislation, designed to restore the law with respect to pregnant women employees to the

> point where it was last year, before the Supreme Court's decision in [*Gilbert*].

123 Cong. Rec. 29387 (1977).[8]

This Court has expressly and repeatedly recognized as much. In *Newport News Shipbuilding & Dry Dock Co. v. EEOC*, it acknowledged Congress's view that the "Court had erroneously interpreted [the] Congressional intent [of Title VII] and . . . amending legislation was necessary to *reestablish* the principles of Title VII law as they had been understood prior to the *Gilbert* decision." 462 U.S. 669, 679 (1983) (emphasis added) (citing 123 Cong. Rec. 10581 (1977) (remarks of Rep. Hawkins); *see also Cal. Fed. Sav. & Loan Ass'n*, 479 U.S. at 277 (remarking that the PDA "specifie[d] that sex discrimination *includes*

[8] It is clear that Congress also believed that *Gilbert* was confined to policies concerning benefits during pregnancy leave. Congress included a 180-day compliance provision in the PDA only for the provision of the Act that related directly to the *Gilbert* holding—policies pertaining to fringe benefits. *See* Pregnancy Discrimination Act of 1978, Pub. L. No. 95-555, 92 Stat. 2076, § 2(b). In describing why a 180-day compliance period was necessary for fringe benefit policy compliance, but not for any other type of policy, the House Report stated, "[a]s the *Gilbert* decision permits employers to exclude pregnancy-related coverage from employee benefit plans, H.R. 6075 provides for transition period of 180 days to allow employees to comply with the explicit provisions of the Amendment." H.R. Rep. No. 95-948, at 8. Congress explained why all other employment policies and practices relating to pregnancy had to be brought into compliance with the Act immediately upon its passage: "Section 2(a) provides for an immediate effective date insofar as the bill affects employment policies other than fringe benefits, including . . . denying seniority . . . . Many, if not all such policies, are presumably invalid under present law as interpreted in *Satty*." *Id.*

discrimination on the basis of pregnancy") (emphasis added); *Ariz. Governing Comm. for Tax Deferred Annuity & Deferred Comp. Plans v. Norris*, 463 U.S. 1073, 1086 n.14 (1983) ("[T]he purpose of the PDA was simply to make the treatment of pregnancy consistent with general Title VII principles . . . . ") (Marshall, J., concurring, joined in relevant part by Brennan, White, Stevens, and O'Connor, JJ.); *accord Hall v. Nalco Co.*, 534 F.3d 644, 647 (7th Cir. 2008); *Saks v. Franklin Covey Co.*, 316 F.3d 337, 346 (2d Cir. 2003); *Clay v. Holy Cross Hosp.*, 253 F.3d 1000, 1005 (7th Cir. 2001); *Lang v. Star Herald*, 107 F.3d 1308, 1311 n.2 (8th Cir. 1997); *Fleming v. Ayers & Assoc.*, 948 F.2d 993, 997 (6th Cir. 1991); *Harness v. Hartz Mountain Corp.*, 877 F.2d 1307, 1309 (6th Cir. 1989); *Carney v. Martin Luther Home, Inc.*, 824 F.2d 643, 648 (8th Cir. 1987); *EEOC v. Lockheed Missiles & Space Co.*, 680 F.2d 1243, 1245-46 (9th Cir. 1982).

4. Under This Court's Precedents, AT&T's Policy Was Always Unlawful Because It Undermines Substantive Equality in the Workplace.

Both before and after *Gilbert*, as well as both before and after the PDA was enacted, the use of term-of-employment calculations that treated pregnancy leave less favorably than other medical leave to set pension benefits was unlawful under this Court's decisions interpreting Title VII.

When Congress enacted the PDA, it did so to reestablish the understanding that Title VII requires more than formalistic equality between two groups. It agreed with and vindicated Justice Brennan's

observation in *Gilbert* that "discrimination is a social phenomenon encased in a social context and, therefore, unavoidably takes its meaning from the *desired end products* of the relevant legislative enactment, end products that may demand due consideration to the uniqueness of the 'disadvantaged' individuals." *Gilbert,* 429 U.S. at 159 (Brennan, J., dissenting) (emphasis added); *see also Cal. Fed. Sav. & Loan Ass'n v. Guerra*, 758 F.2d 390, 393 (9th Cir. 1985) (explaining that one cannot measure the "equality of benefits by the sameness of coverage despite differences in need"), *aff'd*, 479 U.S. 272 (1987).

Ensuring substantive equality means ensuring the "equal opportunity to aspire, achieve, participate in and contribute to society based on . . . individual talents and capacities." *United States v. Virginia*, 518 U.S. 515, 532 (1996). Accordingly, as this Court has consistently recognized, policies that reflect or reinforce gender stereotypes are inconsistent with Title VII's goals of substantive equality in the workplace. Policies that count disability leave taken towards time earned in calculating pension benefits, but do not count pregnancy-related leave towards such calculations, reinforce the stereotypical notion that mothers are not workers. Thus, such policies are prohibited under Title VII, irrespective of the PDA. *See, e.g.*, *Price Waterhouse v. Hopkins,* 490 U.S. 228, 251 (1989) (holding that Title VII prohibits the use of sex stereotyping in evaluating plaintiff's candidacy for partnership position, explaining that "we are beyond the day when an employer could evaluate employees by assuming or insisting that they matched the stereotype associated with their group"), *superseded*

by statute, Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1074, *as recognized in Stender v. Lucky Stores, Inc.*, 780 F. Supp. 1302 (N.D. Cal. 1992); *Cal. Fed. Sav. & Loan Ass'n*, 479 U.S. at 290; *Manhart*, 435 U.S. at 709 (stating, when discussing sex discrimination under Title VII, that "[p]ractices that classify employees in terms of religion, race or sex tend to preserve traditional assumptions about groups rather than thoughtful scrutiny of individuals"); *Dothard v. Rawlinson*, 433 U.S. 321, 333 (1977) (holding that "it is impermissible under Title VII to refuse to hire an individual woman or man on the basis of stereotyped characterizations of the sexes"); *Gilbert*, 429 U.S. at 150 n.1 (Brennan, J., dissenting); *Phillips*, 400 U.S. 542 (holding that a policy prohibiting employment of women, but not of men, with pre-school-age children discriminates on the basis of sex in violation of section 703(a) of Title VII, and remanding for further proceedings about whether the employer could establish a BFOQ defense for the policy under 703(e)); *see also Nevada Dep't of Human Resources v. Hibbs*, 538 U.S. 721, 736 (2003) (discussing the need for the Family Medical Leave Act, like Title VII, to address "mutually reinforcing stereotypes that only women are responsible for family caregiving and that men lack domestic responsibilities").

This Court's decision in *Newport News* is emblematic of this Court's approach to Title VII generally—and, specifically, this Court's understanding of the role of the PDA as merely reestablishing the intended meaning and scope of Title VII. In *Newport News*, male employees challenged a company policy that provided less favorable health coverage for pregnancy-related conditions than for other health conditions for employee spouses. 462 U.S. at 670. Because men cannot get pregnant, under a literal approach to this issue, myopically focused on the text of the PDA, a failure to provide pregnancy benefits could not constitute sex discrimination against *men*. The Court recognized, however, that in order to decide whether the policy discriminated against men because of *their* sex, it had to look "beyond the bare statutory language" of the PDA and to the understanding of Title VII as a whole. *Id.* at 676 & n.11 ("Although the [PDA] makes clear that this language should be construed to prohibit discrimination against a female employee on the basis of her own pregnancy, *it did not remove or limit Title VII's prohibition of discrimination on the basis of the sex of the employee-male or female-which was already present in the Act.*") (emphasis added); *see also Int'l Union v. Johnson Controls, Inc.*, 499 U.S. 187, 198 (1991) (holding that policy that requires only female employees to produce proof that they are not capable of reproducing as a

prerequisite for certain jobs is facially discriminatory under Title VII, as "bolstered by the PDA").[9]

California Federal Savings and Loan Association v. Guerra further illustrates the point. The plaintiffs in that case challenged a California law that required employers to provide four months of physical disability leave on account of pregnancy. 479 U.S. at 275-76. They sought a declaration that California's law requiring "preferential" treatment of pregnancy was inconsistent with and preempted by the language of the PDA that required pregnant women to be "treated the same" as other persons equal in their

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[9] That the PDA simply made express Congress's intent to treat pregnancy consistent with general Title VII principles, rather than creating an additional form of discrimination not previously covered, is further illustrated by the following hypothetical scenario. Suppose a company provided pension service credit for sick leave taken for all illnesses and temporary disabilities, except those arising from prostate cancer. Under a proper Title VII analysis, that policy would constitute unlawful discrimination against men. That approach would require a court to look at whether there is equality in results for men and women concerning the comprehensiveness of the service credit system, instead of whether the policy "equally" or "to the same extent" denies prostate cancer coverage to both men and women. *See Gilbert*, 429 U.S. at 153 n.5 (Brennan, J., dissenting). It would be absurd to suggest, as Petitioner's argument essentially does, that such a policy would not constitute sex discrimination against males because no "prostate cancer amendment" to Title VII has been enacted.

inability to work. *Id.* at 279.[10] This Court rejected the notion that the PDA substantively altered Title VII or constrained a state's ability to take measures to achieve substantive equality for women. *Id.* at 284-85.[11]

In its rulings in *Newport News* and *California Federal Savings*, this Court relied on a contextual understanding of sex discrimination instead of assessing the policy at issue under a formal equality framework. It explained that in determining whether sex discrimination exists, one should look at the goal to be achieved—equality in the workplace—rather than the sameness in policies. *Cal. Fed.*, 479 U.S. at 277. In *Newport News*, for example, the Court recognized that in determining whether discrimination was present, its focus should not be on the universal need for the specific benefits at issue. *See* 462 U.S. at 684 ("Under the proper test petitioner's plan is unlawful, because the protection it affords to married male employees is less comprehensive than the protection it affords to

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[10] The second clause of the PDA provides that "women affected by pregnancy, childbirth, or related medical conditions *shall be treated the same* for all employment-related purposes, including receipt of benefits under fringe benefit programs, as other persons not so affected but similar in their ability or inability to work, and nothing in section 2000e-2(h) of this title shall be interpreted to permit otherwise." 42 U.S.C. § 2000e(k) (emphasis added).

[11] The Court explained that the purpose of the PDA was to reflect Congress's disapproval of the reasoning in *Gilbert*. The Act's language did not impose a limitation on how sex discrimination with respect to pregnancy could be remedied, but rather was illustrative of a means to do so. *Cal. Fed.*, 479 U.S. at 284-85; *see also Newport News*, 462 U.S. at 679 n.14.

married female employees.").[12] Similarly, in concluding that California's law was not preempted in *California Federal Savings*, the Court thoughtfully discussed how "[a] realistic understanding of conditions found in today's labor environment warrants taking pregnancy into account in fashioning disability policies." *Cal. Fed.*, 479 U.S. at 289 (quoting Justice Brennan's explanation of the proper

[12] Accordingly, if a court employs the traditional "similarly situated" test when inquiring whether sex discrimination has occurred under Title VII, it must look at whether the parties are similarly situated in terms of their position and the desired end products sought to be achieved—such as comprehensive health care coverage—rather than whether they are similarly situated with respect to the need for coverage of a particular medical condition. *See* Siegel, 94 YALE L.J. at 953-55 (cited with approval in *Cal. Fed. Sav. & Loan Ass'n*, 479 U.S. at 285 n.16); Cornelia Pillard, *Our Other Reproductive Choices: Equality in Sex Education, Contraceptive Access, and Work-Family Policy*, 56 EMORY L.J. 941, 964 (2007) (explaining that under a strictly formal equality framework, "insofar as women and men are not similarly situated with respect to pregnancy, they need not be treated equally").

interpretation of Title VII as originally enacted in his *Gilbert* dissent, 429 U.S. at 159).[13]

CONCLUSION

For the reasons stated above and in Respondents' brief, this Court should affirm the judgment of the Ninth Circuit.

Respectfully submitted,

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[13] A substantive equality approach is also reflected in the Convention on the Elimination of All Forms of Discrimination Against Women ("CEDAW"), which has been ratified by 185 nations and was signed by the United States in 1980. The Committee on the Elimination of Discrimination, the body of independent human rights experts that monitors implementation of CEDAW, has stated that "[i]t is not enough to guarantee women treatment that is identical to that of men. Rather, biological as well as socially and culturally constructed differences between women and men must be taken into account" and "[u]nder certain circumstances, non-identical treatment of women and men will be required in order to address such differences." Committee on the Elimination of Discrimination Against Women, *General Recommendation No. 25: (Art. 4), Paragraph 1, of the Convention, (temporary special measures)*, 30th Sess., ¶ 8, U.N. Doc. A/59/38 (2004).